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No. 86-1400

In the Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OIL REFINING COMPANY, INC., PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's refusal to stay an administrative enforcement action initiated by the Environmental Protection Agency to bring petitioner, a debtor-in-possession under Chapter 11 of the Bankruptcy Reform Act, into compliance with federal and local environmental laws.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Ahrens Aircraft, Inc. v. *NLRB*, 703 F.2d 23 (1st Cir. 1983) 9

Canarico Quarries, Inc., In re, 466 F. Supp. 1333 (D.P.R. 1979) 9

Cournoyer v. *Town of Lincoln*, 790 F.2d 971 (1st. Cir. 1986) 9

D.H. Overmyer Telecasting Co., In re, 35 Bankr. 400 (N.D. Ohio 1983) 9

Donovan v. *TMC Industries, Ltd.*, 20 Bankr 997 (N.D. Ga. 1982) 9

EEOC v. *Rath Packing Co.*, 787 F.2d 318 (8th Cir. 1986), cert. denied, No. 86-67 (Oct. 14, 1986) 9

Midlantic National Bank v. *New Jersey Dep't of Environmental Protection*, No. 84-801 (Jan. 27, 1986) 7, 8, 10, 11

NLRB v. *Bildisco & Bildisco*, 465 U.S. 513 (1984) 10

NLRB v. *Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981) 9

Ohio v. *Kovacs*, 469 U.S. 274 (1985) 7, 10, 11, 12

Penn Terra, Ltd. v. *Dep't of Environmental Resources*, 733 F.2d 267 (3d Cir. 1984) 8, 9, 11, 12

United States v. *ILCO, Inc.*, 48 Bankr. 1016 (N.D. Ala. 1985) 9, 11, 12, 13

United States v. *Johns-Manville Sales Corp.*, 13 Envtl. L. Rep. 20310 (D.N.H. Nov. 15, 1982) 12, 13

Statutes and regulations:

Bankruptcy Reform Act of 1978, 11 U.S.C. (& Sup. III) 101 *et seq.*:

11 U.S.C.(& Supp. III) 105 ..... 6, 9

11 U.S.C. (& Supp. III) 362 6

Statutes and regulations—Continued: Page

11 U.S.C. (& Supp III) 362(a) 8
11 U.S.C. (& Supp. III) 362(b) 8
11 U.S.C. 362(b)(4) 7, 8, 10, 11, 12, 13
11 U.S.C. 362(b)(5) 7
11 U.S.C. (Supp. III) 554 10
11 U.S.C. (& Supp. III) 1101 *et seq.* (Ch. 11) 1, 5
Comprehensive Environmental Response, Compensation and Liability Act § 106, 42 U.S.C. 9606 13
Resource Conservation and Recovery Act,
42 U.S.C. (& Supp. III) 6901 *et seq.* 2
42 U.S.C. (Supp. III) 6901(b)(7) 2
42 U.S.C. (Supp. III) 6902(a)(6) 2
42 U.S.C. (& Supp. III) 6921 4
42 U.S.C. (& Supp. III) 6922 4
42 U.S.C. (& Supp. III) 6925 3
42 U.S.C. (& Supp. III) 6925(e) 3
42 U.S.C. (& Supp. III) 6925(e)(1) 3
42 U.S.C. (& Supp. III) 6925(e)(2) 4
42 U.S.C. (& Supp. III) 6926 2
42 U.S.C. (& Supp. III) 6930 3
42 U.S.C. (& Supp. III) 6973 13
40 C.F.R:
Pt. 261:
Section 261.24 ..... 4, 6
Section 261.32 ..... 4, 5
Pt. 265 3
Subpt. G:
Section 265.112 4
Section 265.113 4
Subpt. F 3
Subpt. H 3
Subpt. K 3
Pt. 270:
Section 270.1(b) 3
Section 270.13 3
Section 270.14 3
Section 270.121(b) 2

Miscellaneous: Page

47 Fed. Reg. 45880 (1982) 2
H.R. Rep. 94-1491, 94th Cong., 2d Sess. (1976) 2
H.R. Rep. 95-595, 95th Cong., 1st Sess. (1977) 8
S. Rep. 95-989, 95th Cong., 2d Sess. (1978) 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A5-A34) is reported at 805 F.2d 1175. The opinion of the district court (Pet. App. A35-A39) is not yet reported. The opinion of the bankruptcy court (Pet. App. A40-A55) is reported at 58 Bankr. 608.

JURISDICTION

The judgment of the court of appeals (Pet. App. A3) was entered on November 25, 1986. The petition for a writ of certiorari was filed on February 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Commonwealth Oil Refining Company, Inc. (CORCO), a debtor-in-possession under Chapter 11 of the Bankruptcy Reform Act of 1978, 11 U.S.C. (& Supp. III) 1101 *et seq.*, challenges the decisions of the courts below refusing to stay an Environmental Protection Agency

(EPA) administrative enforcement action. That action charges that CORCO, a Puerto Rican company, has failed to comply with provisions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. (& Supp. III) 6901 *et seq.*

1. Congress passed the RCRA in 1976 to address the increasingly serious environmental dangers arising from the generation, management, and disposal of industrial waste products, including hazardous wastes. See H.R. Rep. 94-1491, 94th Cong., 2d Sess. 3 (1976). Congress mandated comprehensive cradle-to-grave regulation of hazardous wastes and provided an array of strong enforcement mechanisms. It amended the RCRA extensively in 1984 to broaden and strengthen the regulatory program and to reduce reliance on land disposal of hazardous waste. 42 U.S.C. (Supp. III) 6901(b)(7), 6902(a)(6).[1]

The RCRA provides that each owner or operator of a facility for the treatment, storage, or disposal of hazardous waste must obtain a permit to engage in such activities. Congress recognized that such a comprehensive permit system could not be instituted immediately for all facilities. It therefore provided that owners and operators of certain existing hazardous waste management facilities would be treated as having been issued a permit until final

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[1] EPA may authorize a state to operate its own hazardous waste program in lieu of the federal program. To obtain such authorization, the state program must be at least as stringent as the federal program. 42 U.S.C. (& Supp. III) 6926. Although EPA authorized Puerto Rico to operate "Phase I" of the hazardous waste program on October 14, 1982 (47 Fed. Reg. 45880), Puerto Rico was never authorized to operate "Phase II," which consists of a permit program for hazardous waste treatment, storage, and disposal facilities. 40 C.F.R. 271.121(b). Therefore, authority for requesting permit applications and issuing permits to hazardous waste facilities in Puerto Rico has always rested with EPA.

administrative disposition of their permit application could be made. 42 U.S.C. (Supp. III) 6925(e).[2]

To achieve "interim status," a hazardous waste management facility must fulfill three statutory conditions. See 42 U.S.C. (& Supp. III) 6925(e)(1). First, it must have been in existence on November 19, 1980, or the effective date of the statutory or regulatory changes that render the facility subject to the permit requirement. Second, the facility's owner or operator must have submitted preliminary notification to EPA, as required by 42 U.S.C. (& Supp. III) 6930, stating the location and general description of its hazardous waste activity and listing the hazardous wastes involved in its operation. Finally, the owner or operator must have applied for a permit under 42 U.S.C. (& Supp. III) 6925. EPA has interpreted this final condition as requiring submission of Part A of the permit application (40 C.F.R. 270.1(b)), which provides general information about the facility and the hazardous waste activity occurring at the facility. 40 C.F.R. 270.13. Part B of the application, which is submitted when EPA initiates the final permitting process for an individual facility (40 C.F.R. 270.1(b)), provides specific information concerning the individual site and the operation of the facility. 40 C.F.R. 270.14.

The RCRA provides that in certain circumstances a facility will lose its eligibility to operate under interim status and must cease operation until issuance of a final permit. For example, the 1984 RCRA amendments provide that each land disposal facility operating under in-

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[2] These interim status facilities must comply with regulatory standards which are analogous to, but less stringent than, the standards for permitted facilities. See 40 C.F.R. Pt. 265, 270.1(b). The standards address, among other matters, groundwater monitoring and financial responsibility requirements (40 C.F.R. Pt. 265, Subpts. F and H). EPA has promulgated specific standards governing interim status surface impoundments (40 C.F.R. Pt. 265, Subpt. K).

terim status prior to November 8, 1984, must submit a Part B permit application and a certification of compliance with all applicable groundwater monitoring and financial responsibility requirements by November 8, 1985, in order to retain interim status after that date. 42 U.S.C. (& Supp. III) 6925(e)(2). Facilities that lose eligibility to operate under interim status must cease acceptance of hazardous waste for treatment, storage, or disposal, and must commence closure activities. See 40 C.F.R. 265.112, 265.113.

2. CORCO achieved interim status on November 18, 1980. Part A of its permit application described the nature of its business as the "manufacture of gasoline, heating oils, residuals fuels and liquified petroleum gas by crude distillation and cracking and manufacture of aromatic petrochemicals by naphtha fractionation and solvent extraction" (RE 70).[3] This process generated approximately 2,476,000 tons annually of four different wastes identified by EPA, pursuant to Sections 3001 and 3002 of the RCRA, 42 U.S.C. (& Supp. III) 6921, 6922, as hazardous wastes (RE 74).[4] The method of disposal for each listed waste included surface impoundment (*id.* at 54, 74).

CORCO engaged in its refinery operations until March 3, 1982 (RE 77). Thereafter CORCO rented its storage tanks to various industrial companies for storage of fuel oil, gas, and liquified natural gas storage (*ibid.*). On March 23, 1984, EPA inspected the CORCO facility. The inspection revealed that a hazardous waste identified by

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[3] "RE" refers to the record excerpts filed by the government in the court of appeals.

[4] EPA identifies hazardous wastes by letter and number. CORCO's four wastes are: K051 (American Petroleum Institute (API) separator sludge from petroleum refining industry); D005 (barium); D006 (cadmium); and D008 (lead). 40 C.F.R. 261.24, 261.32.

EPA's RCRA regulations as K049,[5] but not listed on CORCO's Part A application, had been stored on-site for approximately one year (*id.* at 77-80). It also revealed that sludge from the surface impoundments had not been removed for disposal off-site (*id.* at 79). An analysis of samples taken from these surface impoundments revealed the presence of RCRA-regulated organic compounds and metals, including barium (D005), lead (D008), and cadmium (D006) (*id.* at 79-80).

On April 12, 1984, EPA requested CORCO to submit Part B of its permit application by October 12, 1984. EPA contacted CORCO on November 1, 1984, after failing to receive the requested information. CORCO informed EPA at a November 8, 1984, meeting that it would submit its Part B application or a closure plan by November 16, 1984. CORCO requested and received a 3-week extension to December 7, 1984. On December 11, 1984, CORCO informed EPA that it would not submit either its Part B application or a closure plan. Pet. App. A9; C.A. App. Tab 11 (Simon Affidavit).[6]

3. Meanwhile, on July 11, 1984, almost three months after EPA had requested CORCO's Part B application, CORCO filed a petition for reorganization under Chapter 11 of the Bankruptcy Reform Act, 11 U.S.C. (& Supp. III) 1101 *et seq.*, in the United States Bankruptcy Court for the Western District of Texas (Pet. App. A9-A10). On December 13, two days after notifying EPA that it would not submit its Part B application or closure plan, CORCO moved the bankruptcy court for an order staying any future EPA administrative proceedings. CORCO contended that it was entitled to a stay, under the Bankruptcy

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[5] K049 refers to "slop oil emulsion solids from the petroleum refining industry." 40 C.F.R. 261.32.

[6] "C.A. App." refers to an appendix submitted in the court of appeals captioned "Corrections to the Record on Appeal."

Reform Act's automatic stay provisions (11 U.S.C. (& Supp. III) 362) or as a discretionary matter (11 U.S.C. (& Supp. III) 105), of any EPA administrative action requiring it to submit its Part B application upon pain of losing its interim status and having to close its facility (Pet. App. A9-A10). CORCO claimed that the stay would give it "a reasonable time to reach a management decision, and if it then so chooses, to file a Permanent Permit B Application" (RE 85).

Following an evidentiary hearing, the bankruptcy court denied CORCO's request for a stay (Pet. App. A41-A55).[7] The court concluded (*id.* at A45-A49) that the Bankruptcy Reform Act expressly exempts EPA's administrative action from the Code's automatic stay provision because the

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[7] CORCO's vice-president in charge of compliance with state and federal statutes (RE 44) admitted on cross-examination that the company had failed to take action required by Puerto Rico's hazardous waste regulations. Specifically, he admitted (RE 50) that CORCO had failed to install a groundwater monitoring system at the Puerto Rico facility. As a result, CORCO had conducted no groundwater sampling and had performed no analyses of water samples to determine if they contained any indications of groundwater contamination (RE 50). He further testified that CORCO had failed to prepare and submit an outline of a groundwater quality assessment plan (RE 51); that CORCO had not prepared a written post-closure plan (RE 51); and that CORCO had not filed a written hazardous solid waste analysis plan (RE 51); and that he did not know if there is groundwater contamination under the Puerto Rico facility (RE 51).

EPA's expert witness testified that CORCO's Part A application demonstrated that the company had treated and disposed of hazardous wastes in surface impoundments at its facility (RE 54). Moreover, he testified that such storage can cause groundwater contamination, but that without groundwater monitoring no such determination could be made (RE 56). He further testified that the existence of heavy metals and Extraction Procedure (EP) toxic materials in the surface impoundments at the facility indicated that hazardous waste had been disposed of in those units (RE 60). Materials which are EP toxic, as defined in 40 C.F.R. 261.24, are considered hazardous wastes for purposes of the RCRA.

EPA action is a "proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. 362(b)(4). The court further held (Pet. App. A53-A55) that CORCO had failed to establish an entitlement to a discretionary stay. The district court affirmed the bankruptcy court's decision (*id.* at A36-A39).[8]

The court of appeals affirmed the district court's order (Pet. App. A5-A34). The court agreed that EPA's administrative action against CORCO falls within the Bankruptcy Reform Act's express exception, set forth in Section 362(b)(4), to the automatic stay provision (Pet. App. A17-A20). It specifically rejected CORCO's contention that this Court's decisions in *Midlantic National Bank* v. *New Jersey Dep't of Environmental Protection,* No. 84-801 (Jan. 27, 1986), and *Ohio* v. *Kovacs,* 469 U.S. 274 (1985), indicate that the Section 362(b)(4) exception should operate only in situations in which there is an "imminent and identifiable harm" to the public health or safety or where urgent public necessity is shown. Pet. App. A20-A23. It also rejected CORCO's contention that EPA's enforcement action is an attempt to enforce a money judgment and, thus, is proscribed by Section 362(b)(5) of the Bankruptcy Reform Act. Pet. App. A25-A29. The court agreed with the Third Circuit's deci-

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[8] Following the bankruptcy court's decision, EPA issued an administrative complaint against CORCO (RE 15-22). The complaint enumerated violations of both RCRA and Puerto Rico statutes applicable to interim status facilities. They include in part: (1) storage of hazardous wastes in tanks without identifying such storage in its permit application (RE 16); (2) failure to install, operate and maintain a groundwater monitoring system and groundwater sampling and analysis plan (RE 16-17); (3) failure to prepare a post-closure plan (RE 17); (4) failure to develop and follow a written solid hazardous waste analysis plan (RE 17); and (5) failure to submit a Part B permit application or a closure plan (RE 18). EPA later filed an amended administrative complaint to reflect CORCO's loss of interim status.

sion in *Penn Terra, Ltd.* v. *Dep't of Environmental Resources,* 733 F.2d 267 (1984), that EPA's enforcement action is not converted into an action to enforce a money judgment simply because compliance with federal and state laws will require expenditure of funds.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or any court of appeals. Review by this Court is accordingly not warranted.

1. Section 362(a) of the Bankruptcy Reform Act provides that the filing of a bankruptcy petition operates as a stay, applicable to all entities, of the commencement or continuation of judicial, administrative, or other proceedings against the debtor. 11 U.S.C. (& Supp. III) 362(a). Section 362(b) recognizes a number of exceptions to this automatic stay. 11 U.S.C. (& Supp. III) 362(b). Section 362(b)(4) specifically provides that the filing of a bankruptcy petition does not operate as a stay of "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" (11 U.S.C. 362(b)(4)). The court of appeals correctly held that EPA's administrative action against CORCO falls squarely within the Section 362(b)(4) exception. Pet. App. A17-A20.[9] That result is consistent with numerous court

[9] The legislative history demonstrates that the Section 362(b)(4) exception was enacted to cover precisely the situation encountered here; namely, "where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws * * *." S. Rep. 95-989, 95th Cong., 2d Sess. 52 (1978); H.R. Rep. 95-595, 95th Cong., 1st Sess. 343 (1977). As this Court observed in *Midlantic National Bank,* the automatic stay exception was intended to counteract judicial expansion of the automatic stay that threatened "to foreclose States' efforts to enforce their anti-pollution laws * * *" (slip op. 9 (footnote omitted)). Congress nowhere suggested that the Section

decisions interpreting the automatic stay provision in both environmental[10] and non-environmental contexts.[11]

Bankruptcy courts do have some power to weigh the equities in granting a discretionary stay. See 11 U.S.C. (& Supp. III) 105. But CORCO is clearly not entitled to a discretionary stay in this case. All three courts below concluded that the equities here do not favor CORCO. See Pet. App. A29-A34, A38, A53-A55. As the court of appeals explained, "After two petitions for bankruptcy protection, numerous extensions of the exclusivity period in the current reorganization, and no reorganization plan yet filed, CORCO is in no position to argue that it is

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362(b)(4) exception to the automatic stay applies *only if* there is an imminent and identifiable harm to the public health and safety.

[10] See *Penn Terra, Ltd.* v. *Dep't of Environmental Resources,* 733 F.2d 267 (3d Cir. 1984) (requiring a debtor to comply with mining regulations); *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D.P.R. 1979) (pre-Bankruptcy Reform Act case requiring a debtor to comply with local air pollution control requirements); *United States* v. *ILCO, Inc.* 48 Bankr. 1016 (N.D. Ala. 1985) (requiring debtor to comply with an environmental injunction).

[11] See, *e.g., Cournoyer* v. *Town of Lincoln,* 790 F.2d 971 (1st Cir. 1986) (town's action to clear debtor's property of scrap metal and automotive parts exempt from automatic stay); *EEOC* v. *Rath Packing Co.*, 787 F.2d 318 (8th Cir. 1986), cert. denied, No. 86-67 (Oct. 14, 1986) (government's Title VII action exempt from automatic stay); *Ahrens Aircraft, Inc.* v. *NLRB,* 703 F.2d 23 (1st Cir. 1983) (NLRB order awarding back pay exempt from automatic stay); *NLRB* v. *Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981) (NLRB proceeding for entry of judgment for back pay exempt from automatic stay); *In re D.H. Overmyer Telecasting Co.,* 35 Bankr. 400 (N.D. Ohio 1983) (FTC action to strip debtor of its broadcasting license exempt from automatic stay); *Donovan* v. *TMC Industries, Ltd.*, 20 Bankr. 997 (N.D. Ga. 1982) (action to enjoin sale of goods produced in violation of Fair Labor Standards Act exempt from automatic stay).

'equitably' entitled to more time to comply with EPA's requirements. The time has come for CORCO to comply." Pet. App. A34.

2. CORCO contends that the court of appeals' decision is inconsistent with various decisions of this Court and the lower courts. Closer inspection reveals, however, that there is no substantial conflict warranting this Court's review.

a. CORCO first argues (Pet. 7-9) that the court of appeals' conclusion is inconsistent with this Court's decision in *NLRB* v. *Bildisco & Bildisco,* 465 U.S. 513 (1984), because that decision requires a "balancing of equities where the Bankrupcty Code confronts a nonbankruptcy federal policy" (Pet. 7-8). But Congress itself has already "balanced the equities" by carefully crafting the Bankruptcy Reform Act's automatic stay provision and specifying certain express exceptions. The determination whether EPA's enforcement action falls within the Section 362(b)(4) exception to the automatic stay provision is purely a question of statutory construction that the court of appeals rightly decided.

b. CORCO next argues (Pet. 9-11, 15-18) that the court of appeals' decision conflicts with this Court's decisions in *Midlantic National Bank* v. *New Jersey Dep't of Environmental Protection,* No. 84-801 (Jan. 27, 1986), and *Ohio* v. *Kovacs,* 469 U.S. 274 (1985). CORCO incorrectly interprets these cases as permitting a governmental unit to exercise its police powers against a debtor only when the public is faced with "imminent" harm.

The *Midlantic National Bank* decision addressed a bankruptcy trustee's abandonment powers, holding that the Bankruptcy Reform Act's seemingly unqualified abandonment provision (11 U.S.C. (Supp. III) 554) is subject to implicit police power limitations. That holding, which

rested on congressional ratification of past bankruptcy practices,[12] has no direct application in the case of the Act's automatic stay provision, which Congress expressly qualified with an exception permitting governmental units to enforce their "police or regulatory power" 11 U.S.C. 362(b)(4)). That broadly worded exception plainly permits the EPA to maintain its present environmental enforcement action regardless of the presence or absence of "imminent" harm.

The *Kovacs* decision addressed the dischargability of a debtor's environmental cleanup obligations, holding that the obligation in that case was dischargeable because the cleanup duty "had been reduced to a monetary obligation" (469 U.S. at 282).[13] That holding also has no application here, where EPA seeks compliance with environmental laws rather than monetary payment.[14] Indeed, the Court specifically stated that "[t]he automatic stay provision does not apply to suits to enforce the regulatory statutes of

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[12] Prior to the Bankruptcy Reform Act, the courts had adopted the practice of permitting bankruptcy trustees to abandon burdensome property. However, they also recognized that a trustee may not abandon property that would create a public nuisance. This Court concluded that the Bankruptcy Reform Act's codification of the trustee's common law abandonment power, while seemingly unlimited on its face, implicitly includes that common law exception (*Midlantic National Bank,* slip op. 11-12) and does not permit the trustee to abandon property in blanket disregard of laws or regulations "reasonably calculated to protect the public health or safety from imminent and identifiable harm" (*id.* at 12 n.9).

[13] The Court observed that the state had sought appointment of a receiver and seizure of Kovacs' assets, and that all the state was interested in was " 'a money payment to effectuate the * * * clean up' " (469 U.S. at 282).

[14] The court of appeals correctly held (Pet. App. A25-A29) that the fact that compliance with the law requires the expenditure of funds does not convert an administrative action into an action for a money judgment. See *Penn Terra, Ltd.* v. *Dep't of Environmental Resources,* 733 F.2d at 274-278; *ILCO Inc.*, 48 Bankr. at 1023.

the State * * *" (*id.* at 283-284 n.11) and that "we do not question that anyone in possession of the site—whether it is Kovacs or another * * *—must comply with the environmental laws of the State of Ohio" (*id.* at 285).

c. CORCO further argues (Pet. 13-15, 17-18) that the court of appeals' decision conflicts with a number of lower court decisions, including *Penn Terra, Ltd.* v. *Dep't of Environmental Resources,* 733 F.2d 267 (3d Cir. 1984); *United States* v. *ILCO, Inc.,* 48 Bankr. 1016 (N.D. Ala. 1985); and *United States* v. *Johns-Manville Sales Corp.,* 13 Envtl. L. Rep. 20310 (D.N.H. Nov. 15, 1982), which CORCO characterizes as limiting government enforcement actions against a debtor to cases involving "imminent" harm. That characterization is plainly inaccurate with respect to the two reported cases, there is no meaningful conflict warranting this Court's review.

In *Penn Terra, Ltd.,* the Third Circuit concluded that a state proceeding to compel a company to correct its violations of environmental laws is exempt from the automatic stay, holding that Section 362(b)(4) should be construed broadly to preserve laws enacted to protect the public interest (733 F.2d at 273). The court nowhere stated that the exemption was available only because Penn Terra's violations posed "imminent" harm. Indeed, those violations, which included failure to maintain adequate erosion and sedimentation controls, failure to seal a deep mine pit, and failure to treat mine drainage properly (*id.* at 269 n.2) did not present hazards any more "imminent" than those presented by CORCO's failure to comply with RCRA requirements.[15] In *ILCO, Inc.,* the court held that an EPA enforcement action, which included claims of "imminent

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[15] This Court cited *Penn Terra* with approval in *Kovacs* (469 U.S. at 283 n.11) and the bankruptcy courts have since followed the Third Circuit decision. See, *e.g., United States* v. *ILCO, Inc., supra.*

and substantial endangerment" under Section 7003 of RCRA (42 U.S.C. (& Supp. III) 6973) and Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9606), was exempt from the Bankruptcy Code's automatic stay by virtue of Section 362(b)(4). 48 Bankr. at 1023-1024. As in *Penn Terra, Ltd.*, the court nowhere suggested that the Section 362(b)(4) exemption is limited to claims of "imminent and substantial endangerment." Thus, both *Penn Terra, Ltd.* and *ILCO, Inc.* are fully consistent with the decision below.

In *Johns-Manville Sales Corp.*, an unreported 1982 decision, the district court stayed a governmental action seeking clean-up of an asbestos site on the ground that it would impose a monetary obligation on the debtor. 13 Env. L. Rep. at 20311-20312. The correctness of that decision is open to debate in light of the appellate decisions that we have discussed. In any event, any divergence between the court of appeals' decision here and that unreported district court decision does not create a conflict warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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